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Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS REPORTS ANNOTATED

LEGAL NEWS NOTES AND FACETIÆ

VOL. 13. JANUARY, 1907. No. 8.

CASE AND COMMENT

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THE LAWYERS CO-OPERATIVE PUB. CO., Rochester, N. Y.

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Views of the Governors.

"We have been intrusted by the people with the task of forging their will into law at a time of peaceful, but very general social, revolution. In such times of peculiar upheaval there is the greatest possible opportunity of achievement for the public good so long as the lawmaking power discriminates between hysterical clamor and calm appeal, substituting reformation for deformation." This is the keynote of the inaugural address of Governor Guild of Massachusetts, and it is entirely in harmony with the spirit manifested by the addresses and messages of the governors of several other states at the beginning of this new year. Their utterances, taken together, strongly indicate that various measures which have been persistently demanded in the interest of the public, but which have been quite as persistently obstructed by the lower order of politicians, have a good prospect of success this year.

First, a demand for the extension of the corrupt practices acts, which have met with all kinds of opposition from those politicians at whose practices the laws are aimed, is strongly made, not only by Governor Guild, but by Governor Hughes, of New York. In several states the laws thus far passed on this subject have been so framed by hostile legislators as to leave them comparatively ineffective and unsatisfactory. "Open at both ends" is the just characterization of the present New York law on the subject.

The evil of lobbying gets attention from Governors Warren, of Michigan, Folk, of Missouri, and Higgins, of Rhode Island. Governor Folk, as the press reports him, asserts that legislative lobbying should be made a crime. Governor Warren urges the elimination of the professional lobbyist. Governor Higgins says the evil has been practised in Rhode Island to a disgraceful extent; that it has not only been reduced to a fine art, but to an exclusive and oppressive monopoly. According to the news report of his address, he says one man alone does practically all the lobbying in the Rhode Island legislature. These are not the utterances of irresponsible theorists or sensational writers for the press, but of governors of states, who certainly know something about the political conditions and speak under the sobering responsibility of the highest official position.

On the subject of gambling, Governor Floyd, of New Hampshire, speaks of the race-track legislation and the decision of the supreme court on the subject, and says: "If anything more is needed to defeat the

purposes of those who would bring scandal, disgrace, and loss of property upon New Hampshire by legalizing here what is against private morals and sound public policy and has been outlawed elsewhere, it should be written into our laws by you." Governor Folk's message is also quoted in the press to the effect that betting on horse races should be stopped. The New York situation is shown in the article below on legislative protection of gambling. There is some reason to hope that the gamblers may lose control of the legislatures.

Ballot reform is also discussed at considerable length by Governor Hughes, who recommends the adoption of a simple form of ballot with the names of the candidates for each office grouped under the name of the office, with the appropriate designation of the party opposite the candidate's name. This would not allow a voter to vote for all the candidates of his party *en bloc*, but would compel him to vote separately for each of them. The option to vote a whole ticket by a single mark on the ballot, or by pulling a single lever on the ballot machine, although one can split his ticket if he chooses, obviously tends to straight voting, and therefore the politicians have steadily persisted in preserving that privilege. On the other hand, a demand for such a ballot as Governor Hughes recommends has been persistently made by organizations formed in the interest of good government, and by independent voters generally.

The above are a few of the matters on which the governors are expressing plainly the nonpartisan demands of the general public, and which professional politicians have persistently opposed hitherto. In none of them is there even the semblance of partisanship, or what is usually called politics. They demand nothing but honesty and public morality. This is not the year for the millennium. But, in the language of Governor Guild, it is a time "of peaceful, but very general social, revolution." There is much reason to believe that the tacit and long-existing contract between the people and the politicians, by which the latter were to do the public business for what they could make out of it, has been canceled and will not be renewed.

The Federal Fellow-Servant Law.

A decision by Judge McCall of the Federal court in Tennessee is reported in the public press, against the constitutionality of the act of Congress relating to the liability of interstate carriers to employees for injuries. The court is reported by the press as follows: "My conclusion is that Congress is not authorized, under the circumstances complained of, to enact this legislation, for the reason that the relation of interstate-commerce common carriers, engaged in interstate trade or commerce, to their employees, and their liability to them in damages for injuries sustained in their employment as the result of the negligence of any of their officers, agents, or employees, or by reason of any defects or insufficiency due to their negligence in their cars, engines, appliances, machinery, track, roadbed, ways, or works, is not commerce within the meaning of the Constitution."

So much has been said recently about the powers of Congress over corporations engaged in interstate commerce that this decision is of more than passing interest. There has been a well-recognized tendency to extend the powers of Congress in various directions over the business activities of the country by virtue of its authority over interstate commerce. The final determination of this case, if it shall go to the Supreme Court of the United States, may do much to settle the question whether the power of Congress over interstate commerce shall be expanded to cover a complete Federal control of interstate-commerce corporations, or whether it shall be limited to a regulation of the commerce itself. There may be room for a distinction between regulating the duties and liabilities of interstate carriers, on the one hand, toward the persons with whom they contract for interstate transportation, and, on the other hand, toward other persons with whom they may contract either for labor or materials used in performing the service, but which, while essential, are only incidental to it.

Public Authority for Private Nuisance.

"Public authority may confer the right to operate a public work, and thus make it

lawful, but cannot confer a right to take or damage private property without compensating the owner for its value as taken or damaged—*i. e.*, diminished in its market value as property—by some physical invasion of it, or by affecting some right of the owner in relation to it." This clear and wholesome doctrine is announced by the supreme court of Mississippi in King v. Vicksburg R. & Light Co. 42 So. 204. This doctrine, sustained by many decisions as shown by an elaborate note in 1 L.R.A. (N.S.) 49, has nevertheless been mistaken by many courts through confusion of principles. Under constitutional provisions against taking property without just compensation, some courts have denied any compensation for damaging the property, even when the damage was well-nigh equivalent to a destruction of the value. Here there seems to have been, as the starting point of these decisions, an assumption that "property" was not taken unless the tangible, physical object was removed from the possession of the owner, while in the true sense a man's property in anything includes all the rights and privileges therein which make it valuable to him. To overcome this line of decisions, constitutions in various states have been amended to provide expressly for compensation where property is damaged. What constitutes due compensation in such cases is defined in the above case as "what will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses, or by interference with some right in relation to property, whereby its market value is lessened as the direct result of the public use." Emphasizing the property owner's rights in this respect, the court declares: "Were an act passed by the legislature for the exercise of the right of eminent domain, declaring that no liability should arise for noise, smoke, soot, cinders, vibration, and the like, whatever their hurtful effect on the property of others might be, it would be void, because the elements or factors of damage to property depend upon facts, and are to be ascertained by evidence in judicial proceedings."

The theory that the legislature can give immunity for the maintenance of what constitutes a nuisance to private owners cannot be reconciled with the constitutional guaranties. Taking one man's property and giving it to another by legislative *ipse dixit* is not due process of law; nor does it give him the equal protection of the laws.

Legislative Protection of Gambling.

The following language from District Attorney Jerome, of New York, justly characterizes the shameful law by which the legislature of the state of New York has wilfully violated the Constitution of the state by practically legalizing what the Constitution prohibits: "When the new Contion was adopted, in 1894, an expressed clean provision was inserted in that Constitution, prohibiting gambling in the state of New York, and enjoining the legislature of the state to enact appropriate laws to prevent it. The legislature did enact appropriate laws in all respects save one. They wilfully and deliberately enacted a law known as the Percy-Gray law, and surrounding its enactment there were the gravest scandals, and the law was so framed that, while nominally it imposes a penalty and was enacted in obedience to the new Constitution, it was craftily and designedly framed so as to permit gambling on race tracks in this state. The result of it has been that on one side of a barbed-wire fence a man commits a felony if he does certain acts, while on the other side of the same fence the same acts are perfectly innocent and legal." It would take even more severe language than that of Mr. Jerome to do justice to the situation. Legislators who had sworn to support the Constitution deliberately proceeded to thwart and defeat its commands, and up to the present time the influence of the race-track gamblers has been too great to allow the repeal of the law. It is not often that a statute so openly creates a privileged class who are exempted from the provisions of a penal law, or by so transparent a trick cheats the people out of the benefits of what they supposed they had secured by constitutional mandate.

A Crusader against Vice.

Few things are more contemptible, or

more discreditable to the press of the United States, than the persistence of many newspaper men in magnifying every mistake, and often misrepresenting the acts, of Anthony Comstock in his lifelong and heroic fight against the vilest and most diabolical forms of vice. Some newspapers never speak a word in his praise, however great the good he accomplishes, and never fail to hold him up to ridicule and obloquy, if in the slightest degree he oversteps the boundaries of good judgment. In effect, though it may not be fair to say in purpose, a large part of the press is arrayed solidly on the side of vice against the man who deserves the eternal gratitude of every decent citizen of the United States for his unrelenting and heroic fight against the most depraved forms of vice. Traffic in the indescribably indecent and corrupt literature with which, by serpentine methods and Satanic cunning, the young boys and girls in our schools have long been supplied in secret has been one of the worst forms of vice, against which he has unremittingly and tirelessly fought. Why reputable newspapers should lend themselves to systematic attacks upon such a foe to vice and such a defender of the innocence of youth is past understanding. But many of the smart young men of the press never lose a chance for a gibe or a thrust at him, or to make him appear as a meddlesome and intolerable nuisance, if in the strenuousness of his warfare against everything vile he makes the slightest mistake on the side of over strictness. A report that his commission as a postoffice inspector had been canceled was recently published. Who originated this report does not appear, but it seems to have been one of the numerous attempts of his enemies to discredit him. As a rebuke to this, the Postmaster General, in a published letter, says: "Inspector Comstock has been recommissioned for the year 1907, as he has been for every year since 1873;" and he takes occasion at some length to say: "I feel that I should avail myself of this opportunity to express in the strongest terms the Department's appreciation of the faithful services rendered by Inspector Comstock for many years; there may have been a few cases in which his methods have been open to criticism, but any man who wages war on impurity and obscenity cannot hope to avoid criticism. He has stood as a barrier between the youth of the land and a frightfully demoralizing traffic, and I want him to know that, looking at his work in its larger aspect, he has had and will continue to have this Department's support."

For any mistakes which this man may make trying to protect society, and especially the youth, from the most demoralizing influences of vice, he is, of course, subject to criticism; but, considering the unspeakable benefits of his work and his chivalrous devotion to it, his mistakes should be criticized temperately, and full honor should be paid to the nobility of his services. Some of the criticisms on him may be thoughtless and some malicious. To all hostile critics of either class the high commendation of the Postmaster General is a needed rebuke.

Civil Remedy of Federal Government to Enforce Treaty.

The article in our November issue, as to the Federal power to enforce our treaty obligations, called forth from one correspondent a protest against the suggestion that civil remedies, such as injunction, prohibition, mandamus, etc., might be invoked by the Federal government in appropriate cases when treaty obligations were denied, even though the citizens or officials of a state might be the parties to be controlled. This suggestion might have been made as a positive declaration without impropriety. Where a valid treaty is violated by state officers under the color of a state law which is in conflict with the treaty, the right of the Federal government to invoke such remedies to compel observance of the treaty by such state officials seems to be clearly established by the Federal decisions. That state officers may be controlled by injunction issued by a Federal court when their acts, though in accordance with state law, are in conflict with the paramount Federal law, has been decided in various cases by the Supreme Court of the United States. For instance, in Davis v. Gray, 16 Wall. 203, 21 L. ed. 447, an injunction was granted by a Federal court against state officials, including the governor, to prevent them from carrying out provisions of the state Constitution because they violated the Federal Constitution. In the leading case of Os-

born v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204, injunction was sustained in a Federal court against state officials to prevent them from enforcing a state law because it was in conflict with Federal law. Mandamus, as well as injunction, has been issued by Federal courts to state officers, as in Poweshiek County v. United States, 9 Wall. 736, 19 L. ed. 813. The decisions of this court are clear to the effect, as stated in Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623, that such writs from a Federal court may run against state officers, notwithstanding they may plead the authority of an unconstitutional state law in defense.

That a treaty of the United States is a supreme law of the land is settled by the Constitution of the United States, and it cannot be questioned that a valid treaty of the United States is as much paramount to a state law in conflict with it as is a valid act of Congress, or a provision of the Constitution itself. Therefore, it can hardly be doubted that the United States has the same right to invoke civil remedies to protect Federal rights under the treaty that it has to protect Federal rights under provisions of the Constitution or acts of Congress.

That a suit may be brought for the protection of such rights by the Federal government itself was settled in Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, where a suit for an injunction on behalf of the United States was sustained for the protection of the rights of the public under Federal law in the use of the mail service and the exercise of interstate commerce. In sustaining this right of the Federal government to enforce public rights under Federal law, the court said: "Every government intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other; and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." The decision in this case was rendered without dissent.

The jurisdiction of the circuit court of the United States is expressly granted by the act of March 3, 1891, chap. 517, among other kinds of cases, in that class of controversies in which "the United States are plaintiffs or petitioners."

There seems to be no escape, in the light of these authorities, from the conclusion that, if a valid Federal treaty is violated by state officers, the United States government may invoke the aid of Federal courts by appropriate civil remedies, such as injunction, mandamus, etc.

Whether or not the Federal treaty with Japan was violated by state officials in California in the matter of the public schools is a question on which no opinion whatever was ventured in the former article or in this. Nothing was discussed except the question of the rights and remedies of the Federal government if in any case a valid treaty should be violated.

Invalid Treaties Violating State Rights.

How far the Federal government has power to go in making treaties, the effect of which may directly or indirectly interfere with the exercise of the rights which belong to the states, is a question which might arise if it were found that the school laws of California were in conflict with the Japanese treaty. The correspondent who objected to the November article, above referred to, denies the validity of the Federal treaty if it interferes with the power of the state to regulate its own public schools. That is a question, however, which was not considered or thought of in the article to which he objected, as all that was there said was in reference to the remedies in case of the violation of a treaty assumed to be valid. But it is obviously an important question, and apparently one on which the courts, if it should be presented, must find their way without the aid of any direct precedents. If a state should entirely exclude aliens of a certain nation from its public schools, its courts, or other institutions controlled by the state, notwithstanding a treaty with such nation guaranteeing to its people in this country all the rights enjoyed by aliens of other nations,

the question would be very sharply presented. If such provisions of a treaty are within the scope of the constitutional grant of power "to make treaties," it seems clear that they must override state laws to the contrary. As to such a conflict, the question then would seem to be, Does this power to make treaties include the power to provide therein as to the status of aliens in this country? Their status in the different states as well as in the District of Columbia and the territories must be within the scope of a treaty provision of this kind if it is to be of much value. To what extent, therefore, the status of aliens within the different states can be determined by treaty provisions is a question that may prove complex and perplexing.

That a treaty may bind the states with respect to the rights of aliens therein in some matters that are ordinarily controlled by state law has been established. That a treaty may be effectual to protect the land of an alien from forfeiture or escheat under the laws of a state was held in Fairfax v. Hunter, 7 Cranch, 627, 3 L. ed. 453, and Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613. Again, in Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628, the right of an alien to sell real property and withdraw and export the proceeds by virtue of a treaty provision was upheld against an attempt on the part of the state to appropriate the property to itself by escheat, on the ground that the state law had not made any provision as to the time within which the alien heir must exercise his right. The court said: "That the laws of the state irrespective of the treaty would put the fund into her coffers is no objection to the right or the remedy claimed" by the alien heirs. In this class of cases it is therefore clear that the treaties control the states with respect to the rights of aliens to take real property. Now, the regulation of the tenure and inheritance of real property is recognized by the Federal courts as peculiarly a matter for the states, as declared in United States v. Fox, 94 U. S. 315, 24 L. ed. 192, where the devise of property to the Federal government was held void under the state laws. "It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. . . . The power of the state in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the state, whether *inter vivos*, or testamentary, are not matters placed under the control of Federal authority." If, then, in a matter so strictly belonging to the states, the state laws must yield to Federal treaties so far as the rights of aliens are concerned, this would seem to indicate that the regulation of the status of aliens by Federal treaty might be deemed paramount to state laws on other subjects which are not committed to Federal control, but are reserved to the states. Certainly the cases on this subject, above cited, cannot be regarded as indications of any modern aggressions of Federal authority since they have been accepted as the law of the subject for nearly a century. Possibly there may be different considerations that might create a distinction between these cases of the rights of aliens with respect to real property and those that might arise with respect to their privileges in schools or courts, but it may not be unreasonable to conclude that the treaty-making power extends to the determination of the status of aliens with respect to any disabilities or discriminations against them as among the international questions which are always arising between nations, and which must necessarily be settled by treaty if at all.

International Rivers.

Two questions of special interest are suggested, if not actually raised, with respect to the rights and liabilities of this government with respect to international rivers. One grows out of the tapping and draining of the Colorado river, by which the natural flow of the river through Mexico to the ocean is stopped and the water is discharged into the great depression called the Salton sink, and is forming a large inland lake. Unless it can be restored to its original channel there will be a question as to who is in fault for this change and as to the respective rights and liabilities of the United States

and Mexico. Would either government have a claim on the other for this interruption of the natural flow of the river and its diversion in a new direction? It seems to have been supposed by the nations of the world that where a river flowed through the territory of several nations each of them had a right to the continued flow of that river in its natural channel, and that any interference with this by another nation would be an international wrong; but it does not appear that any such case has ever been made the subject of an international contest, either by war or arbitration. The question now pending in the United States Supreme Court between Kansas and Colorado, as to the taking of the water of the Arkansas river by Colorado to the injury of Kansas, is somewhat akin to this, though it is not the same. It is not at all probable that any unpleasant dispute will arise between the United States and Mexico out of this unique situation, though it is conceivable that there might be a case of considerable importance for settlement by diplomacy or arbitration.

The other case, previously mentioned in these columns, is that of the Niagara river. It is contended on the part of those who wish to divert the water of that river for manufacturing purposes that the United States government has no authority to interfere in the matter because the river is not navigable. But there are several other questions to be considered. Has the Niagara river, being the boundary river between the United States and Canada, an international character such that it is the proper subject for treaty regulation between the United States and Great Britain? Would not either government have a just complaint against the other if it should drain the river by drawing off the water into its own territory by artificial means as, for instance, by a canal from Lake Erie to Lake Ontario? If so, would not the United States government be liable for the drawing off of the water of the river into the territory of the United States though it were done, not by the national government, but by the state of New York, or by its permission? If the Federal government could be held liable in such a case, must it not have authority to prevent the commission of the acts which would make it liable? Those to whose interest it is to take the water may not find it easy to be reconciled to the theory that the Federal government has any authority in the matter. But if, while they wanted to take the water on this side it was all taken away from them by and for the exclusive benefit of the Canadians on the other side of the river, they would quite likely find it much easier to think the United States government ought to interfere for their protection. It does not seem unreasonable to suppose that both nations have a right to insist on the natural flow of the river between their respective shores, and that the United States government, because of its liability for wrongful diversion of the river on this side and its right to protest against such diversion on the other side, has a legitimate function as against its own people, even though within the bounds of a state, to prevent any such diversion of the water as might constitute a wrong to Great Britain.

Index to New Notes

IN

LAWYERS' REPORTS ANNOTATED

5 L.R.A.(N.S.) pages 49—368.

Removal of causes.

Removal of cause to Federal court because of separable controversy:—(I.) Introduction; (II.) review of statutes: (a) act of 1866; (b) act of 1867; (c) act of 1873; (d) act of 1875; (e) acts of 1887 and 1888; (III.) scope and limitations of statutes: (a) in general; (b) as to aliens; (c) as to states; (d) as to residence; (e) as to citizenship; (IV.) what constitutes separable controversy: (a) the general rules: (1) elements of separable controversy; (2) actions on joint or joint and several, liability; (3) joinder of causes of action; (b) how determined: (1) in general; the record; (2) the complaint; (3) the answer or other defensive pleading; (4) the petition for removal; (5) proceedings subsequent to application for removal; (c) effect of failure to serve, default, or dismissal as to one party; (V.) application of general rules in particular actions: (a) actions relating to real estate: (1) controversies concerning title, interest, possession, etc.; (2) foreclosure of mortgages and other liens; (3) condemnation proceedings; (4) local assessment proceedings; (5) partition, assignment of dower, and other actions; (b) actions relating to

Among the New Decisions.

Action. Violation of an ordinance requiring those in charge of street cars to keep a vigilant watch for persons on or approaching the tracks is held, in Sluder v. St. Louis Transit Co. (Mo.) 5 L.R.A.(N.S.) 186, to give a right of action to a person injured thereby, although the authority given to the municipality for enforcement of the ordinance extends merely to fine or imprisonment.

The operation of an automatic, push-button, electrical passenger elevator without an operator in an apartment building where several children under ten years of age live and use it, in a city in which the duty to employ an operator is imposed by ordinance and the failure to discharge this duty is made a misdemeanor, is held, in Shellaberger v. Fisher (C. C. A. 8th C.) 5 L.R.A.(N.S.) 250, to constitute sufficient evidence of negligence, actionable by a child of five or six years of age, who is injured while running the elevator, to warrant the submission of the question of negligence to the jury.

Police and health ordinances regulating the care of city property are held, in Sul-

livan v. Huidekoper (D. C. App.) 5 L.R.A. (N.S.) 263, not to extend the liability of lot owners for injury to children trespassing on their property by reason of ponds left there in violation of the terms of the ordinance.

Bankruptcy. Where, under the state law, a chattel mortgage must be recorded to be valid against creditors, it is held, in First Nat. Bank v. Connett (C. C. A. 8th C.) 5 L.R.A.(N.S.) 148, that it is required to be recorded within the meaning of the amendment of 1903 to § 60a of the bankruptcy act, defining an illegal preference, where the other conditions concur, as a transfer by an insolvent within four months of the filing of a petition in bankruptcy against him, and providing that, where the preference is in a transfer, the period of four months shall not expire until four months after the recording or registering of the transfer, if by law such recording or registering is required.

Benevolent societies. See CONTRACTS; INSURANCE.

Bills and notes. See SUNDAY.

Carriers. Whether or not it is negligence for a passenger on a street car to permit his arm to project slightly beyond the side of the car is held, in Georgetown & T. R. Co. v. Smith (D. C. App.) 5 L.R.A.(N.S.) 274, to be a question for the jury.

Civil rights. The power of Congress, under U. S. Const., 13th Amendment, to make it an offense against the United States, cognizable in the Federal courts, for private individuals to compel negro citizens by intimidation and force to desist from performing their contracts of employment, is sustained in Hodges v. United States, Advance Sheets, U. S. (1906) page 6; but it is held that the remedy must be sought through state action and in state tribunals, subject to the supervision of the Supreme Court of the United States by writ of error in proper cases.

Cloud on title. When a patent or deed includes within the exterior bounds of the lands thereby conveyed lands which are excepted by such grant or deed from its operation, a plaintiff in equity, suing to remove cloud from his title, is held, in Logan v. Ward (W. Va.) 5 L.R.A.(N.S.) 156, to be bound to show that the land he claims against the defendant is not the land so excepted.

Commerce. The prohibition against the receipt by common carriers for transportation beyond the limits of the territory, of hides which do not bear the evidence of inspection required by N. M. act March 19, 1901, is held, in New Mexico ex rel. McLean & Co. v. Denver & R. G. R. Co. Advance Sheets, U. S. (1906) page 1, to be a valid exercise of the police power, and not to violate the commerce clause of the Federal Constitution.

Constitutional law. Statutes legalizing school bonds previously voted upon by cities for high-school and graded-school houses, under the provision of Minn. Gen. Laws 1893, chap. 204, p. 333, and acts amendatory thereto, are held, in State ex rel. Board of Education v. Brown (Minn.) 5 L.R.A.(N.S.) 327, to be curative acts, and not special legislation in conflict with the Constitution of the state.

A statute incorporating a local benevolent society with the same name as that of a previously existing voluntary state association, whose charter had been withdrawn by the foreign corporation which issued it, and conferring upon it the exclusive right of granting subcharters in the state, is held, in National Council v. State Council, Advance Sheets, U. S. (1906) page 46, not to impair contract obligations of a foreign society, or to deprive it of property rights without due process of law, or to deny to it the equal protection of the laws.

A statute forbidding the resale of tickets to places of amusements at a price higher than that originally placed upon them is held, in Ex parte Quarg (Cal.) 5 L.R.A.(N.S.) 183, to violate the constitutional right of property, where, by statute, the ticket is at least an irrevocable license to the purchaser to be in the place of amusement during the performance.

Contracts. A contract by which one person employs an agent to negotiate for the purchase of real estate is held, in Johnson v. Hayward (Neb.) 5 L.R.A.(N.S.) 112, not to be a contract for the creation of an estate or interest in land, or trust or power over or concerning lands, within the meaning of the statute of frauds.

A contract by which one employs another to appear at a public sale of land and bid in and purchase land in the name of the first party, but to pay for it with his own money, which is to be refunded to him as soon as the amount is ascertained, the per-

son making the purchase to be paid a fixed sum for his compensation, is held, in Schmidt v. Beiseker (N. D.) 5 L.R.A.(N.S.) 123, to be a contract of agency, and not to be within the statute of frauds.

Convicts. The right of the legislature to lease farms on which to work convicts, under a constitutional provision that it may place convicts on state farms and "may buy farms for that purpose," is sustained in State ex rel. Greaves v. Henry (Miss.) 5 L.R.A.(N.S.) 340.

Corporations. See WRIT AND PROCESS.

Demurrage. See STRIKES.

Elevators. See ACTION.

Fires. See TRIAL.

Habeas corpus. Disobeying the law governing the selection of grand jurors is held, in Matter of Moran, Advance Sheets, U. S. (1906) page 25, not to affect the jurisdiction of the court, so as to justify the release by habeas corpus of a person convicted under an indictment found by such jurors.

Insurance. A by-law of a fraternal insurance society which provides that, if any member heretofore or hereafter adopted shall become intemperate in the use of drugs, the benefit certificate held by such member shall, by such acts, become and be void as to benefits, and all payments made thereon shall be thereby forfeited, is held, in Taylor v. Modern Woodmen of America (Kan.) 5 L.R.A.(N.S.) 283, not to apply to the case of a member who, prior to the enactment of such by-law, had become intemperate in the use of drugs, and continued so thereafter.

Judgment. Notice of the denial of the death of the insured in the answer in an action on a policy of insurance is held, in Fidelity Mut. L. Ins. Co. v. Clark, Advance Sheets, U. S. (1906) page 19, not to be notice of the fraud in recovering judgment on the policy while the insured was alive, which will impeach such judgment as to the parties to whom the clerk of court pays over, out of the money paid into court in satisfaction of such judgment, the sums called for in certain assignments of an interest in the policy, by way of contingent fees for professional services rendered in good faith in collecting the insurance.

A judgment of the Supreme Court of the United States to the effect that a policy of fire insurance could not be recovered upon as it stood, nor be helped out by any doctrine of the common law, is held, in Northern Assur. Co. v. Grand View Bldg. Asso. Advance Sheets, U. S. (1906) page 27, not to be denied full faith and credit by an adjudication of a state court that such judgment is not a bar to a suit in equity to reform the policy, so that it will express consent to concurrent insurance, and to recover upon such policy as reformed.

Landlord and tenant. A property owner is held, in Mylander v. Beimschla (Md.) 5 L.R.A.(N.S.) 316, not to be liable for injuries to adjoining property by a defective condition of a water spout which originates while his property is in possession of a tenant, unless he has agreed to make repairs.

Libel. A report by the proper official of the War Department to the Secretary of War as to the merits of a claim for a medal of honor for services of a soldier in an action which has been referred to him for investigation, which report contains nothing that does not relate to, or reflect upon, the character of claimant and the foundation of his claim, is held, in De Arnaud v. Ainsworth (D. C. App.) 5 L.R.A.(N.S.) 163, to be absolutely privileged, notwithstanding the motive which may have actuated the maker or the mistakes of fact which it may contain.

Monopoly. An association of retail dealers in lumber, organized to prevent its members from being subjected to competition of wholesalers, which requires a fixed amount of stock, continuously carried, to entitle a dealer to membership, and levies upon and collects from wholesale dealers a penalty in case they make sales to consumers directly, or to retail dealers not eligible to membership in the association, is held, in Cleland v. Anderson (Neb.) 5 L.R.A.(N.S.) 136, to be unlawful as in violation of the Nebraska anti-trust act.

Negligence. See SHIPPING.

Public improvements. The implied power of a municipal corporation to impose upon abutting property owners the cost of improving a way from high to low water mark of a public navigable river is denied in Terrell v. Paducah (Ky.) 5 L.R.A.(N.S.) 289.

Railroads. See TRIAL.

Removal of causes. A suit by several creditors of an insolvent bank to enforce the statutory double liability of stockholders, which prays an accounting in favor

of all creditors and a *pro rata* payment to them, with repayment to stockholders in case of a surplus, is held, in Miller v. Clifford (C. C. A. 1st C.) 5 L.R.A.(N.S.) 49, not to present a case of separable controversy as to the rights of a single nonresident stockholder, which the latter may remove to the Federal court.

Shipping. A tug is held, in Quinette v. Bisso (C. C. A. 5th C.) 5 L.R.A.(N.S.) 303, not to discharge its full duty to small craft which may be in its way on a river by giving fog signals when proceeding in a fog so dense that they can be seen only a few feet away.

Statute of frauds. See CONTRACTS.

Strikes. A strike of coal operatives, making necessary the importation of coal to such an extent as to overtax the capacity of a harbor and delay vessels chartered to carry coal in unloading, is held, in W. K. Niver Coal Co. v. Cheronea Steamship Co. (C. C. A. 1st C.) 5 L.R.A.(N.S.) 126, not to be within the clause of a charter party providing that, in case of strikes which delay discharge, the charterer is not liable for the delay, since such strike is merely a *causa sine qua non*, and not a *causa causans*, of the delay.

Sunday. The maker of a note is held, in Hale v. Harris (Ky.) 5 L.R.A.(N.S.) 295, not to be able to defeat payment because it was delivered on Sunday, unless he surrenders the consideration received for it.

That in gathering a crop it is somewhat less expensive and more convenient to work seven days in the week than six is held, in Com. v. White (Mass.) 5 L.R.A.(N.S.) 320, not to make such work one of necessity, within the meaning of a statute making it unlawful to do on the Lord's Day any work except works of necessity.

Taxes. The franchise to use the streets of a municipal corporation for gas and water mains and electric wires, and to take tolls by reason of such use, is held, in Stockton Gas & E. Co. v. San Joaquin County (Cal.) 5 L.R.A.(N.S.) 174, to be located in the municipality where exercised, within the meaning of a constitutional provision that all property shall be assessed in the city where it is situated, notwithstanding it is owned by a corporation located elsewhere, and originates in a constitutional provision that any corporation incorporated for those purposes shall have the right of using the public streets.

Trial. Under a statute casting upon a railroad company, in an action for damages caused by fire from a locomotive, the burden of proof to rebut the presumption of actionable negligence on its part, upon proof by the plaintiff that a fire was kindled upon his lands adjoining a railroad track by sparks from its locomotive, it is held, in Continental Ins. Co. v. Chicago & N. W. R. Co. (Minn.) 5 L.R.A.(N.S.) 99, that the question of negligence is for the jury, unless the rebutting evidence is conclusive as to both the facts and the inferences reasonably to be drawn from them.

Trusts. See WILLS.

Wills. A life estate, and not a fee, is held, in Haviland v. Haviland (Iowa) 5 L.R.A.(N.S.) 281, to be given to testator's wife by a provision in his will giving her his property "for her exclusive use and benefit during her life," and after her death whatever remains to be divided among testator's children.

A devise of testator's property to his wife, "to be hers absolutely," is held, in Moran v. Moran (Mich.) 5 L.R.A.(N.S.) 323, to vest in her a fee; and a subsequent clause "providing that if, at her death, any of the property be still hers," then the residue "shall go to my heirs," is held to be void for repugnance.

A trust for the payment of debts is held, in Gordon v. McDougall (Miss.) 5 L.R.A.(N.S.) 355, to be created by the will of a person whose estate will be wholly absorbed by their payment, in case the law takes its course, directing that all of testator's just debts be paid as soon as can be done without injury to his estate, establishing an annuity to be paid from the estate for an indefinite time, blending real and personal property into one common mass, empowering the executors to sell either and give good titles and carry on the business of the estate, specifying the order in which real estate shall be disposed of, and limiting his wife to support with a life estate only in what remains after payment of debts.

Writ and process. When a foreign corporation conducts a regular business in the state at a permanent place of business, a service of process made at such place of business upon its agent in connection with the matter growing out of such business is

held, in Curtis v. Jordan (La.) 5 L.R.A. (N.S.) 298, to be good, if the same service would be good as against a domestic corporation; and an act requiring surety companies of other states and of foreign countries to appoint an agent upon whom service of process may be made, and an act authorizing service to be made upon the secretary of state, are held not to provide an exclusive, but an additional, mode of service.

New Books.

"Foibles of the Bar." By Henry S. Wilcox. (Legal Literature Company, Chicago, Ill.) 1906. 1 Vol. $1.00.

This little book is a companion to the "Foibles of the Bench," by the same author. It makes entertaining reading and touches on weaknesses which every lawyer has seen some other lawyers exhibit.

Forms of Common Law Declarations for Use in State and Federal Courts. By George C. Gregory. Published by the author. Richmond, Va. 1906. 1 Vol. $7.50.

This book contains 109 common-law declarations. It is prepared especially for the lawyers practising in the common-law states; but it is believed that it will also prove to be of great assistance to the lawyers practising in the Code states. The cases covered are of such variety as to be applicable to almost any state of facts.

Hutchinson on "Carriers." 3d ed. By J. Scott Matthews and William F. Dickinson. 3 vols. $18.

"Studies in American Jurisprudence." By Theodore F. C. Demarest. $3.

"Studies in Constitutional History." By J. Oscar Pierce. $1.50.

"Legal Record Reports." (Schuylkill County, Pa.) Vol. 3. By Pilgrim and Walker. $4.

"Massachusetts Revised Laws, Annotated Supplement 1902–1906." By John Peck. $5.

"Missouri Annotated Statutes." 5 vols. $25. Delivered.

Marr's "Criminal Jurisprudence of Louisiana." $15.

Reed & Shutt's "Complete Guide for Supervisors, Town and County Officers." (New York.) $5.

"Financing an Enterprise." By Francis Cooper. 2 vols. $4.

"Rules Regulating the Practice of the State and Federal Courts Sitting at Pittsburg, and of the Courts Having Jurisdiction of Appeals Therefrom, and of the Departments of the State and Federal Governments." By Percival G. Digby. $10.

"Supplement to Kansas Digest of the Supreme Court Reports." By C. F. W. Dassler. Buckram, $5. Law Sheep, $5.50.

Recent Articles in Law Journals and Reviews.

"Ordinances and Resolution Distinguished as Relate to Legislative, Quasi Legislative, and Ministerial Acts on the Part of the Council or Governing Legislative Body."—63 Central Law Journal, 413.

"The Power of Municipal Corporations to Make Special Assessments for Local Improvements."—68 Albany Law Journal, 325.

"The Economic Advisability of Inaugurating a National Department of Health."—68 Albany Law Journal, 338.

"Delegation of Authority by an Agent."—5 Michigan Law Review, 94.

"Control of Corporations."—18 Green Bag, 662.

"A Special Jury Law."—33 National Corporation Reporter, 529.

"Liability of Insurance Company when the Assured Makes True Statements in His Application and the Insurance Agent or Examining Physician Inserts False Reports."—63 Central Law Journal, 450.

"Evidence Admissible to Prove a Sale a Mortgage."—8 Bombay Law Reporter, 320.

"Exigencies Which Seem to Require the Calling of a Constitutional Convention in Missouri."—63 Central Law Journal, 431.

"The Law of Bank Checks (Practical Series)."—23 Banking Law Journal, 861.

"The Sending of Out-of-Town Checks to the Drawee,"—23 Banking Law Journal, 375.

"The Uniform Negotiable Instruments Law."—1 Illinois Law Review, 305.

"Reforms in the Law of Future Interests Needed in Illinois."—1 Illinois Law Review, 311.

"Evolution of the Law by Judicial Decision."—14 American Lawyer, 490.

"Some Legal Aspects of the Philippines." —14 American Lawyer, 495.

"The Divorce Problem and Recent Decisions of the United States Supreme Court." —14 American Lawyer, 499.

"Freedom of the Executive in Exercising Governmental Functions from Control by the Judiciary."—14 American Lawyer, 503.

The Humorous Side.

POETRY OF THE LAW.—A clipping from a Texas paper sent us by a correspondent is understood to be a poem by the editor expressing his inspired view of local jurisprudence.

"Viewing De Kangaroo Court.

"You talk about your sweet taters and your
goose-berry jam,
But the way the 'red nose judge' runs the
kangaroo court is
Simply, well I'll be ——
A case was before his honor, I believe during
last week,
And the conduct of 'maurrey' during that
trial was a
Disgrace and a friek.
This judge sit with dignity and not a word
by him was said,
When this little squirt of a lawyer attempted to strike a sure
Enough lawyer across the head.
The conduct of the judge was naughty you
cant well dispute,
But of all disgraceful lawyers is 'maurrey,'
who at the trial,
Attempted to loop-the-loop.
The verdict rendered therein, they say, went
their way,
'But he who fights and runs away will (particularly in this)
Live to fight another day.'
So dear judge you should remember while
on the throne,
The people elected you to meet out justice
to all alike—not
There for favors to condone.
The little squirt of a lawyer, we will say is
not even a sham
And his legal ability and knowledge of legal
ethics are just
Simply not worth a——"

AN OKLAHOMA DEED.—A formal warranty deed of land in a certain county of Oklahoma, executed several years ago, after describing the premises as a certain lot of a certain block in the original plan or plat of a certain town, proceeds further to describe the premises by saying that said "town does not merely exist in the imagination of the victim of the Boomer, but a real and tangible town all staked off with the names of the owners of the lots, with drives, subways, boulevards, plazas, and a public square, all clearly drawn and outlined on the original plat and plans of said town, which town by the order of all created things is destined to become the metropolis of the Great Middle West." It further specifies that this tract or parcel of land was conveyed by the grantor to a certain corporation organized "for the purpose of, and with full powers to lay off, stake off, boom and build a real city with intellectual frost work on the window panes of the ever restless speculator as he gazes forever on the out-stretched sands. And being a part and parcel of the same tract or parcel of land represented by said company's probable agent, J. M. L.—— as being the termini of three Grand Trunk Railway lines penetrating from the North, East and South, with terminal stations, car shops, railway elevators, tanks, an acre of switch yard tracks, all laid off in said plans and specifications of said town." The habendum clause states that the grantee is to have and to hold said land "whether real or unreal" with appurtenances, etc. And the grantor covenants "that I am lawfully seised and possessed of same of all of the above described property, if I am seised and possessed at all, have a good and indefeasible right to alien, sell and convey, or give away, same, if indeed I have any right at all, and that it is unencumbered in so far as I am able to find out with natural or unnatural resources or pecuniary advantages;" also further covenanting "that I will warrant and forever defend the title to him, his heirs and assigns, but no further than it will be defended to me by said company against the lawful claims of all persons whomsoever."

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